1983

Boyd Corbett, Keith Gurr and Utah Ranch Lands, A Partnership v. Lee A. Fitzgerald, Helen Fitzgerald, His Wife, Perry G. Fitzgerald And Carolyn Fitz Gerald, His Wife : Brief of Respondents Perry G. Fitzgerald And Carolyn Fitzgerald

IN THE SUPREME COURT
OF THE
STATE OF UTAH

BOYD CORBETT, KEITH GURR and UTAH RANCH LANDS, a partnership,

Plaintiff-Appellant,

vs.

LEE A. FITZGERALD, HELEN FITZGERALD, his wife, PERRY G. FITZGERALD and CAROLYN FITZGERALD, his wife,

Defendant-Respondent.

Case No. 19225

BRIEF OF RESPONDENTS
PERRY G. FITZGERALD
AND CAROLYN FITZGERALD

Appeal from a Judgment by the
Fourth Judicial District Court of
Utah County, State of Utah
The Honorable J. Robert Bullock

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BRIEF OF RESPONDENTS

NATURE OF CASE

Except for two corrections the Nature of the Case is set forth by Appellants' statement. The first is that the contract involving the respondents Fitzgeralds was dated March, 1978, not February, 1978. Also the issue of slander of title was not litigated in this case and can not hereafter be litigated because that issue is now res judicata as a result of the dismissal of Appellants' prior appeal of the judgment of the lower court as to these respondents in Case No. 18529 dated November 1, 1982.

DISPOSITION IN LOWER COURT

After this Court dismissed with prejudice Appellants' prior appeal as to these respondents, the trial court amended, corrected, and clarified its judgments, pursuant to Rule 60(a). Its judgment as to these respondents

is dated May 17, 1981, and the amendments converted the prior order to convey certain property received by appellants as a down payment on the March, 1978, contract (and sold by them prior to trial which resulte in the May 17, 1982, judgment) into a money judgment since appellants were not able to comply with that order. It also corrected the oversigh of a $48,500 mortgage so as to allow judgment to these respondents for only the net amount since only such net was received by appellants. It also adjusted the value of the property received by these respondents to market value rather than contract value ($240 per acre rather than $320 as per the contract). The lower court reaffirmed its position that "The decision should be and is based upon the equitable principle of unjust enrichment." (R 930)

RELIEF SOUGHT ON APPEAL

Appellants state they "seek reversal of the judgment on the Februar 78 Contract" despite the fact that such judgment was appealed from in Case No. 18529 and that appeal was dismissed with prejudice on November 1, 1981 (see Supreme Court motion file in that case).

Respondents' position as to the claimed relief based on slander of title is set forth under Nature of Case and is hereby incorporated by reference.

STATEMENT OF FACTS AS TO PERRY G. AND CAROLYN FITZGERALD

Appellants' statement of the facts is flawed because (1) it makes attempt to limit the facts to the proper scope of this appeal; (2) it does not canvas those facts in the light most favorable to the prevail party; (3) it does not cite the record as to where those facts are to b found.

The appropriate facts are as follows:

1. After entry of the judgment of May 17, 1982, Appellants did not convey to these Respondents the property they were ordered to convey because they sold that property prior to that judgment. (R 930)

2. The difference in value between what Appellants received as a down payment (an apartment house and other property having a value of $125,000 but encumbered by a $48,500 mortgage) and what Respondents received (60 acres of unimproved land worth $240 per acre) was $62,100. (R 931, 932)

3. There were expert opinions that the value of the property received by Appellants was more ($203,000 according to Respondents' expert).

4. No evidence concerning slander of title was offered or received by the lower court after Case No. 18529 was dismissed with prejudice.

ARGUMENT

THE APPELLANTS SHOULD NOT BE AWARDED A JUDGMENT FOR DAMAGES AGAINST RESPONDENT PERRY FITZGERALD FOR SLANDER OF TITLE AS SUCH ISSUE WAS NOT LITIGATED IN THE LOWER COURT AND IS NOT REVIEWABLE BY THIS COURT.

Under Argument in Appellants' brief only their Point VII (No. 7 in Table of Contents is not the same) is directed at these Respondents and it is not the same as set forth above.

Respondents will deal with them in the order in which they appear in the Brief, i.e., No. 7, 1, then VII. As to No. 7, it is significant that under the Statement of Facts (P. 25-29) the term "slander of title" does not appear at all and none of the facts there stated relate to it. The only place other than in the table of contents where that term appears

is in (1) the Relief sought on Appeal (P. 3) and no facts, argument or authority is there cited in support thereof; (2) on P. 38 under "Point 7 where no issue is posed and the notice referred to is based on the contract Respondents had with Leland Fitzgerald, not Appellants.

As to 1 (P. 36), the Appellants set up a "straw man" and knock it down, to wit: Respondents' rights under the March 1978 contract. Respondents never claimed at trial that they had any. They abandoned that contract after it became clear to them that they would not acquire any title thereunder since Appellants could only convey title to them by performing on their underlying contract to Leland Fitzgerald and wife as the latter held the title and contended (correctly the lower court found that Appellants were in default on that contract. The trial court did n grant relief to Respondents based on that contract but to the contrary concluded that the March 78 contract had not been performed by either pa that performances of each party were concurrent conditions which had not been fulfilled (hence in effect rescinded by abondonment by both parties The only issue was whether the payments made would be forfeited or be subject to restitution. In view of the vast disparity in values receive the lower court properly ordered restitution (in kind initially, in mone subsequently) to prevent unjust enrichment. (R 930)

As to VII, it's not clear how it is related to 1 which preceeds it Page 36 but in any event all that was said as to No. 7 above is applica in response to it and hence will not be repeated.

Appellants cite two cases in support of their position. Neither case is in point. In Strand v. Mayne, 14 Utah 2d 355 (1963), this Court granted summary judgment in favor of a seller of real estate who was sued by the buyer after the buyer had resold and the initial seller had repossessed upon default by the subsequent buyer and also the initial buyer. The basic claim was one of recovering payments made to avoid an unconscionable forfeiture. The case is clearly distinguishable on two grounds: 1) The buyer there was admittedly in default and the seller was not. In our case the trial court found that "neither party made a conditional tender of the performance required on September 6, 1978, sufficient to place the other party in breach of contract" (R 756, Finding of Fact No. 8), hence neither party was in default. 2) There was no disparity in considerations exchanged in the Strand case. In fact this Court there found that the buyers received"$1,699.00 more than they have paid" (P. 357). In this case the disparity was $62,100 (R 932). Hence that case is no precedent for relief on appeal and in any event such an argument should have been made in Case No. 18529, not in this one.

The second case referrred to above was that of Corporation Nine v. Taylor, 30 Utah 2d 47 (1973). There the lower court found for the sellers and the trial court was not required to find an estoppel under the facts there (here such an issue was not even raised) stating "This court on review will not overturn his determination and compel such a finding unless the evidence clearly preponderates to the contrary" (R 52). Here the evidence does not "clearly preponderate to the contrary" and in any event the time for such

a finding on the issue of breach of contract was when that issue was before this court (or potentially so since no brief was ever filed) on the basis of the May 1982 judgment rather than that of the judgment of April 19, 1983, which did not deal with the issue of breach but only with the sum to be awarded Respondents to avoid unjust enrichment.

CONCLUSION

There is no merit to any points raised by Appellants in their brief. Most importantly all of the issues raised therein are a matter of res judicata due to the dismissal of Case No. 18529 on November 1, 1982. The only proper function of this appellate court as to the proceedings subsequent to that data would be to correct the lower court if its determination of value necessary to convert a property award into a money judgment was not supported by substantial evidence. Appellants do not even contend that the valuation fixed by the lower court did not find such support in the evidence and had they raised the issue it would not have been effective since the valuation was within the range of the experts' opinions and in fact was closer to Appellants' expert than to Respondents' expert.

Dated this 12th day of September, 1983.

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